Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1391

WALTER CROFT BAGNELL,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

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Walter Croft Bagnell, petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Two, entered on October 16, 1979, which affirmed the judgment of conviction of the Superior Court of California for the County of Los Angeles. A timely petition for rehearing was denied by the Court of Appeal on November 7, 1979, and the California Supreme Court denied a petition for hearing on December 13, 1979.

OPINIONS BELOW

The Superior Court of California rendered no decision when it pronounced judgment on February 26, 1979. Petitioner was convicted upon his guilty plea to California Penal Code Section 182 (conspiracy) after the Superior Court denied on January 16, 1979 his pre-trial motion to suppress evidence which was made on the ground that his Fourth Amendment right was violated by a search and seizure of evidence in an apartment which he and his girlfriend shared. The Superior Court made some oral comments at the time it denied the motion, but they are not published. They do appear in the transcript.

The Court of Appeal filed an eight page decision on October 16, 1979 affirming the judgment of conviction. The decision, which was not published, is reprinted in Appendix No. 1 to this Petition. On November 7, 1979 the Court of Appeal denied a petition for rehearing without opinion. A copy of the order is reprinted in Appendix No. 2.

On December 13, 1979 the California Supreme Court denied without opinion a petition for hearing. A copy of the unpublished order is reprinted in Appendix No. 3.

JURISDICTION

The judgment of the Court of Appeal was entered October 16, 1979, but did not become final until the California Supreme Court denied a hearing on December 13, 1979. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1257(3). This Petition was timely filed. See Rule 22 of the Supreme Court Rules.

QUESTIONS PRESENTED

1. Is consent to enter an apartment voluntarily obtained in compliance with the Fourth Amendment when the police tell the tenant, who is waiting outside her apartment in the cold, that if she enters they will follow her in, where she initially chooses to remain outside but eventually enters when she becomes too cold?

2. May the police enter an apartment without a search warrant over five hours after one officer entered the apartment with petitioner, observed the contraband and then arrested petitioner outside the apartment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment:

". . . No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

California Penal Code Section 1538.5:

"(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

"(1) The search or seizure without a warrant was unreasonable.

. . . .

"(m) . . . A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceeding prior to conviction he has moved for the return of property or the suppression of the evidence."

STATEMENT OF THE CASE

Petitioner met two co-defendants and some undercover police officers at a restaurant in Los Angeles on March 8, 1978. They discussed the manufacture of phencyclidine, which is commonly known as PCP or Angel Dust. Petitioner and four of the officers then left the restaurant and drove to an apartment which petitioner shared with his girlfriend, Gina Faber.

At the apartment petitioner and one of the officers entered while the others remained outside. The two co-defendants had gone elsewhere. Petitioner showed the officer some chemicals which were to be used to manufacture PCP. Piperidine was in a five-gallon black can, and two one gallon cans containing bromobenzene and cyclohexanol were inside a suitcase. Petitioner and the officer, who was still acting in an undercover capacity, discussed manufacturing PCP. When they left

the apartment petitioner was arrested at approximately 2:15 p.m.

At another location the two co-defendants were arrested. Numerous police officers then remained outside the apartment shared by petitioner and Gina Faber. The chemicals remained inside while some officers went to obtain a search warrant to enable them to enter the apartment and to seize the chemicals.

While some officers were attempting to obtain a search warrant, others remained outside the apartment waiting for them to return with a search warrant. At 5:00 p.m., Gina Faber arrived. The circumstances surrounding her arrival are significant and therefore will be described according to the testimony given at petitioner's preliminary hearing and at the pretrial hearing on petitioner's motion to suppress evidence.

Faber was called by the prosecution as a witness at the preliminary hearing after being given immunity. Her testimony at the preliminary hearing, like all of the testimony at the preliminary hearing, was considered by the trial court pursuant to stipulation (Reporter's Transcript, pp. 25-26, hereinafter "RT"). Faber returned to her apartment at approximately 5:00 p.m. on March 8, 1978. When she returned she asked the police officers outside her apartment for permission to enter her apartment because she had a package which she wanted to place inside her apartment. The police had told her to place it outside. Eventually, police officer James A. Abbott entered the apartment with her so she could place her package inside her apartment.

About 15 minutes later, after she exited her apartment, she told Abbott that she had a little summer blouse on, that it was getting cold, and that she wanted to go back into her apartment. In Faber's words elicited by the prosecution during the preliminary hearing, "They told me they would accompany me and we entered" (Clerk's Transcript, pp. 69-71, hereinafter "CT").

Faber testified at the request of the petitioner at the hearing in the Superior Court on the motion to suppress evidence. At the hearing, Faber elaborated on her preliminary hearing testimony. She stated that when she returned to her apartment at approximately 5:00 p.m., police officers advised her that she could not enter her apartment. After a few minutes, Faber asked the police officers whether she could go into her apartment to put several packages inside which she had in her arms. In response, the police stated that if she wanted to go in they were going to go in with her. When she entered the first time only one officer followed her in. She immediately exited. Later, while waiting outside, she began to get cold. She again requested permission to go inside her apartment to put something on. The officers did not permit her to go in by herself. Inasmuch as she preferred to go in by herself and the officers would not let her, she remained outside a little while longer where it began to get "extremely cold."

She did not want the officers to go in with her. When she entered her apartment the officers followed her in. She testified that she did not invite them in (RT 28-30).

Faber testified that once she went in and the officers followed her in she told them to wait in the living room until the search warrant arrived (RT 32). Faber did not invite the officers into her apartment (RT 32, line 28).

Los Angeles Police Officer James A. Abbott, who did not testify at the preliminary hearing, testified at the hearing on the motion to suppress that he and other police officers secured the premises at 5414 Newcastle Avenue by waiting outside. They were awaiting the arrival of a search warrant to be obtained by Officer Johnson, who previously informed Abbott that "There were chemicals in the apartment . . ." (RT 10-11).

Officer Johnson told Abbott and other police officers that there was a suitcase and a black five-gallon can in a little office area just inside the door of the apartment (RT 12).

The officers continued to wait for Johnson's return with the search warrant when Georgina Faber returned to her apartment. Abbott told her that he was a police officer and that he was securing her apartment while awaiting the return of other officers with a warrant (RT 13). Faber asked the officers whether she could go in and place a package inside. Abbott told her that because there were chemicals and contraband inside the apartment she would have to be accompanied if she went inside. She did enter briefly and then exited (RT 13-14).

After approximately 30 minutes elapsed, it began to get dark and cool. Faber stated that she wanted to go in to get a coat (RT 14). Abbott testified

that it was getting dark and that Faber said, "I'm starting to get cold. I would like to get a coat." (RT 22.) Officer Abbott replied that someone would have to accompany her and that she could not go into the apartment unless she had a police officer with her (RT 20-22). According to Abbott, Faber stated nothing in response to his statement. Abbott testified,

> "She didn't move to enter the apartment so I assumed she didn't want to go." (RT 22.)

After approximately five minutes, Faber stated, according to Abbott,

> "It's getting cold. We might as well all go inside. We're going to have to wait anyway." (RT 23.)

Finally Faber entered her apartment along with four police officers (RT 15; 19). When the officers entered they went into the living room where they ate pizza and waited approximately an hour and a half for Officer Johnson to arrive with the search warrant (RT 15).

Officers Johnson and Wetzel arrived at the apartment at approximately 7:30 p.m. with an invalid search warrant (RT 15; 19). The officers seized the contraband "pursuant to the search warrant. . . ." (RT 21, line 6.) The officers did not seize the contraband pursuant to their observations (RT 21, lines 4-8).

This testimony, some of which was elicited at the preliminary hearing and considered by the trial court judge who read the transcript, and some of which was given directly in the trial court, led the court to conclude that the seizure could be justified on two theories:

> (1) The officers could have immediately re-entered the apartment after arresting petitioner and seized the chemicals;
>
> (2) Faber voluntarily consented to the entry by the police, who then seized the chemicals which were in plain view.

Both the magistrate at the preliminary hearing and the trial judge ruled that the search warrant was invalid for reasons unrelated to this proceeding. That ruling was not challenged by respondent in the California appellate courts, although it could have been. 1/

1/ People v. Braeseke, 25 Cal. 3d 691 (1979).

MANNER IN WHICH, AND STAGE DURING WHICH, PETITIONER RAISED FEDERAL CONSTITUTIONAL QUESTIONS

Prior to trial, on May 17, 1978 petitioner filed a written Notice of Motion For Order Suppressing and Returning Evidence and a Memorandum of Points and Authorities. The motion sought an order quashing search warrant No. 14546 and an order suppressing and returning all property seized pursuant to the search warrant. Petitioner based his motion in part on the Fourth and Fourteenth Amendments to the United States Constitution. The chemicals had been seized pursuant to the search warrant.

Petitioner brought his motion pursuant to California Penal Code Section 1538.5, which authorizes pretrial motions to litigate the validity of searches and seizures alleged to have been conducted in violation of the Fourth and Fourteenth Amendments.

On January 16, 1979 the Superior Court conducted a hearing on the motion and ruled, as did the magistrate at the preliminary hearing, that the search warrant was invalid. However, the Superior Court also ruled that the police officers who seized the chemicals did not need a search warrant because:

(1) The officers could have immediately re-entered the apartment after arresting petitioner and seized the chemicals;

(2) Faber voluntarily consented to the entry by the police, who then seized the chemicals which were in plain view.

After the court denied petitioner's pretrial suppression motion, petitioner entered a guilty plea to Penal Code Section 182 (conspiracy to manufacture PCP). Petitioner then appealed his conviction in accordance with California law which permits such an appeal where a pretrial suppression motion is denied. He urged the California Court of Appeal to reverse his conviction because the search and seizure violated the Fourth Amendment's prohibition against unreasonable searches and seizures, but his argument was rejected. The California Supreme Court refused to review the decision of the Court of Appeal.

REASON FOR GRANTING THE WRIT

The California Court of Appeal's decision regarding the legality of the search and seizure is not in accord with applicable decisions of this Court.

A. Police Officers May Not Re-Enter an Apartment Hours After They First Entered It

Petitioner was arrested outside his apartment. In Vale v. Louisiana, 399 U.S. 30, 26 L.Ed.2d 409, 90 S.Ct. 1969 (1970), this Court reversed the judgment of the Louisiana Supreme Court and held

unconstitutional a search of the defendant's home conducted by police who had just arrested the defendant outside his house. This Court rejected the state court's view that the search was proper because it occurred "'in the immediate vicinity of the arrest' and was 'substantially contemporaneous therewith.'" 399 U.S. at 33.

The instant case involves an even more flagrant violation of the Fourth Amendment because here, unlike Vale, the police did not immediately enter the premises after petitioner's arrest. Thus, the search was not even "substantially contemporaneous" with petitioner's arrest.

This Court made it crystal clear in Vale v. Louisiana, supra, that the police may not enter the premises without a search warrant. This Court stated,

". . . If a search of a house is to be upheld as incident to an arrest, that arrest must take place inside the house, cf. Agnello v. United States, 269 U.S. 20, 32, 70 L.Ed. 145, 148, 46 S.Ct. 4, 51 ALR 409, not somewhere outside - whether two blocks away. James v. Louisiana, 382 U.S. 36, 15 L. Ed. 2d 30, 86 S.Ct. 151, twenty feet away, Shipley v. California, supra, or on the sidewalk near the front steps. 'Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant.' Agnello

v. United States, supra, at 33, 70 L.Ed. at 149, 51 ALR 409. That basis rule 'has never been questioned in this Court.' Stoner v. California, supra, at 487 n. 5, 11 L.Ed. 2d at 859."

Vale v. Louisiana, 399 U.S. at 33-34.

The California Court of Appeal purported to distinguish Vale by noting that in Vale the police had not been in the home prior to the arrest whereas here the police had been in petitioner's apartment and had seen the contraband. That the police had earlier been in petitioner's apartment cannot give them a perpetual license to re-enter without a search warrant.

In Michigan v. Tyler, 436 U.S. 499, 56 L.Ed. 2d 486, 98 S.Ct. 1942 (1978), this Court held that once firemen lawfully enter a building to put out a fire, they may remain inside without a warrant "for a reasonable time to investigate the cause of a blaze after it has been extinguished. And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional." Id. at 510. However, the firemen may not re-enter the premises four days later, this Court held, because the exigent circumstances which justified the initial search no longer existed. The case stands for the proposition that an initial, lawful, warrantless entry does not permit law enforcement officers to return on subsequent occasions without a warrant. The subsequent entry by the police without a warrant in the instant case comes squarely within the prohibition of

Michigan v. Tyler, supra.

It is no answer to say that in Michigan v. Tyler, the Court did permit the re-entry by the firemen at 8:00 a.m. on January 22, 1970 after they left at about 4:00 a.m. on the same morning.[2/] The Court did permit the re-entry because it concluded that it was a continuation of the initial search which was interrupted by darkness, steam and smoke and that exigent circumstances justified such action. Here, the officers did not enter the premises to resume a search already commenced. The one officer who entered the premises with petitioner prior to his arrest conducted no search. Hence, the subsequent entry by the police was for the purpose of commencing a search and seizure; it was not to resume activity already begun and temporarily halted because of "darkness, steam, and smoke." This Court found the re-entry at 8:00 a.m. to be "an actual continuation of the first [search]." Id. at 511. Here, there was no continuation; the entry subsequent to petitioner's arrest was the first search.

Moreover, this Court found exigent circumstances justifying the initial search and continuation thereof. In the instant case, however, there were no exigent circumstances justifying the entry without a warrant after petitoner's arrest. Indeed, the officers themselves not only believed they needed a search warrant, they had the time to, and did in fact, obtain one. Their problem is simply that

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2/ Justices White and Marshall dissented from this ruling.

the search warrant they did obtain was invalid, a finding respondent could have, but did not challenge, in the state courts.

Three weeks after this Court decided Michigan v. Tyler, supra, it handed down Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978), which invalidated a search conducted by police who were lawfully in petitioner's apartment pursuant to a murder investigation commenced after one officer was shot and killed by petitioner in the apartment. The State of Arizona conceded, as it had to, that the search and seizure would otherwise have been invalid; it merely argued that because a murder had occurred, the Court should establish a "murder scene" exception in order to uphold the validity of the police officers' conduct. This Court rejected the request.

Respondent's position herein, carried to its logical extreme, is that once an officer has been inside a home, he can always return, no matter when, and enter without a search warrant, in order to conduct a search and seizure of the premises. The Fourth Amendment simply does not permit this to occur.

In summary, police officer Johnson, who entered petitioner's apartment with officer Wetzel at 7:30 p.m. pursuant to an invalid search warrant, cannot claim the right to enter based onthe fact that he was inside the apartment with petitioner for about 15 minutes at approximately 2:00 p.m. the same day. His prior entry certainly did not give him the right to re-enter the premises.

Officer Wetzel, who had not been in the apartment earlier, has no basis for claiming a right to enter with an invalid search warrant.

The Court of Appeal's distinction between a search and a seizure is totally incomprehensible. Somehow the Court of Appeal was of the opinion that since the officers did not have to search once they entered the premises, their entry should be viewed differently than if they had to conduct a search. The Fourth Amendment's search warrant requirement to enter a private home is not obviated because an officer knows where in a home the items to be seized are located. That there will be no search once an officer enters a home does not, by itself, affect the requirement of the Fourth Amendment that a search warrant first be obtained for the entry. Perhaps the Court of Appeal was fooled by the name commonly used, "Search warrant." Although its name is "search warrant," it is also required for such activities as entering a home and seizing evidence.

Also significant in this connection is the fact that a search warrant was necessary to the extent the chemicals were located in a suitcase. See United States v. Chadwick, 433 U.S. 1, 55 L.Ed. 2d 538, 97 S.Ct. 2476 (1977), Arkansas v. Sanders, ___ U.S. ___, 61 L.Ed.2d 235, 99 S.Ct. 2586 (1979). The Court of Appeal's statement that no search was conducted must be rejected.

B. The Search and Seizure May Not Be Upheld On the Basis Of Consent

The state trial and appellate courts upheld the seizure of the chemicals at petitioner's apartment on the basis that petitioner's girlfriend, Gina Faber, voluntarily consented to the entry by the police.[3/] This ruling was erroneous for two reasons: (1) Faber did not consent, or if she did, her consent was not voluntary and (2) she did not consent to the entry of officers Johnson and Wetzel, who entered at 7:30 p.m. under the authority of an invalid search warrant, and who seized the suitcase, which contained two cans of chemicals, and the other can of chemicals, pursuant to the search warrant.

Preliminarily, petitioner does not contend that his girlfriend, Gina Faber, with whom he shared the apartment, did not have authority to consent to a search. If Faber's consent was voluntary, petitioner concedes she had the authority to give it. See United States v. Matlock, 415 U.S. 164, 169, 39 L.Ed.2d 242, 94 S.Ct. 988 (1974):

> ". . . [T]he voluntary consent of any joint occupant of a residence to search the premises jointly occupied is

3/ This was one of two alternate theories for upholding the entry without a valid search warrant.

valid against the co-occupant, permitting evidence discovered in the search to be used against him at a criminal trial. . . ."

Petitioner's concession that Faber had the authority to give consent does not decide the questions presented herein:

(1) Did she consent?
(2) If so, was her consent voluntarily given?
(3) If she did voluntarily consent, what did she consent to?

First, petitioner submits that Faber did not consent to the entry of some police officers at 5:30 p.m. The record is clear that she did not want the police to come in at all. She reluctantly entered the apartment because she was getting cold. The officers merely followed her in. There is no dispute in the record on this.

Second, even if Faber's actions in first refusing to enter and in then entering the apartment can in any way be construed as consent, it isclear the "consent" was not voluntary. Respondent had the duty to demonstrate her consent was voluntary. In holding a search and seizure to have been unconstitutional because the consent was not voluntary, This Court stated in Bumper v. North Carolina, 391 U.S. 543, 548-549, 20 L.Ed.2d 797, 88 S.Ct. 1788 (1968),

"When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving

that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid."

To determine whether consent is voluntary or involuntary, this Court stated in Schneckloth v. Bustamonte, 412 U.S. 218, 223-224, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973) that it would be appropriate to examine cases dealing with the voluntariness of confessions. Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978) dealt with the voluntariness of a confession as well as a search and seizure issue. In Mincey the Court stated that in determining "voluntariness" the Court was not bound by a state court's determination that a particular confession was voluntary. "Instead, this Court is under a duty to make an independent evaluation of the record." Id. at 398.

Petitioner submits that the record in the instant case demonstrates that Faber's "consent," if it was consent, was not voluntary. There is really no dispute concerning the evidence in this case. The state courts simply interpreted the undisputed evidence different than it should have been. This Court is not bound by the state court's interpretation of uncontroverted evidence. As a matter of federal constitutional law, Faber did not voluntarily consent to the entry by the police at 5:30 p.m.

Faber's decision to enter the apartment was based on her growing colder and colder. The undisputed evidence is that she did not want the police to enter. Only later, after first waiting outside in the cold, did she decide to enter. She did not want the police to follow her in, but she was given no choice. If she entered to escape the cold, they would follow. Such a decision cannot be construed as voluntary consent.

Third, if her actions in first trying to remain outside in the cold and in their entering the apartment can by any stretch of the imagination be considered voluntary consent to the police to enter, we must still decide what exactly she consented to. Here, the record is clear that the officers were only given permission to remain in the living room of the apartment. They were not given permission to go into other rooms or to conduct a search of the premises.

Absolutely no consent was given to officers Johnson and Wetzel, who arrived two hours later with a search warrant. They were not among the officers who entered at 5:30 p.m. Not only were officers Johnson and Wetzel not given consent to search or seize, they were not even given consent to enter. They entered the apartment pursuant to an invalid search warrant, and seized a suitcase pursuant to that invalid search warrant. Under the authority of Bumper v. North Carolina, supra, the "consent" given to Johnson and Wetzel to search was not voluntary because they searched and seized pursuant to a search warrant. Indeed, Faber gave Johnson and Wetzel no consent.

If the other officers who entered at 5:30 p.m. had been given consent to search and seize, they would have proceeded to do so at 5:30 p.m.

It should also be kept in mind that no consent was ever given to seize and open the suitcase, which contained two cans of chemicals. See United States v. Chadwick, supra, and Arkansas v. Sanders, supra.

In summary, Faber gave no consent to enter. If she did, she did not do so voluntarily. If she did give consent to enter, and she did so voluntarily, she gave it only to the officers who entered at 5:30 p.m., and the consent was limited to permitting the officers to remain in the living room to wait for the arrival of the other officers with a search warrant. The officers who arrived at 7:30 p.m. with a search warrant, later determined to be invalid, were never invited in by Faber. It was their seizure of the suitcase, which contained two cans of chemicals, and the seizure of a third can not inside the suitcase, pursuant to an invalid search warrant, which led to petitioner's prosecution. These items were not located in the living room, where the officers who entered at 5:30 p.m. waited.

The record is clear on this point. Los Angeles Police Officer James A. Abbott was the only witness called by the prosecution at the suppression hearing in the Superior Court. 4/

4/ Other evidence was presented by the transcript of the preliminary hearing. It was at the Superior Court hearing that the prosecution attempted to justify the seizure without benefit of a valid warrant.

He testified that the suitcase and 5 gallon can were seized pursuant to the search warrant and not pursuant to his observations (RT 21).

> ". . . A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid."
> Bumper v. North Carolina,
> 391 U.S. at 549.

CONCLUSION

For the foregoing reasons, petitioner respectfully urges this honorable Court to grant his petition for writ of certiorari and reverse the judgment of the California Court of Appeal, Second Appellate District, Division Two.

Respectfully submitted,

ROGER JON DIAMOND

Attorney for Petitioner

APPENDIX NO. 1

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,	2 CRIM. NO. 34825 (Super. Ct. No. A139968)
Plaintiff and Respondent,	Court of Appeal - Second Dist.
vs.	F I L E D
WALTER CROFT BAGNELL,	Oct. 16, 1979
Defendant and Appellant.	Clay Robbins, Jr., Clerk
	Deputy Clerk

Defendant Bagnell pleaded guilty to conspiring with codefendants Golub and Boring to possess, manufacture and sell the drug PCP. He pleaded guilty, after the superior court ruled that evidence seized by police from an apartment shared by him and his girlfriend and from an automobile belonging to Golub would be admissible at trial. He has appealed urging only that the above evidence should have been suppressed.

The items taken from the automobile were a jar containing a liquid ingredient of PCP known as piperidine, an attache case and a suitcase. Items taken from the apartment consisted of several gallons of piperidine, cyclohexanol and phencyclidine - all ingredients used in concocting PCP.

Officers McConnell and Lanmon of the Los Angeles Police Department, while working under cover, made purchases of cocaine and PCP from Boring in March of 1978. At that time Boring indicated that a friend of his had the chemicals necessary to manufacture PCP. He asked the officers to obtain a chemist to perform the job of manufacturing.

A meeting was arranged at a restaurant. The officers attended with yet a third officer, Johnson, who was a chemist. The officers were introduced to Golub and Bagnell by Boring. Bagnell questioned Johnson as to the amount of PCP that could be manufactured from the quantities of ingredients which he claimed to have. The officer said it would be necessary to see the chemicals in order to answer the question.

Golub offered to show the officer samples which he said were in his car. Johnson said it would be nedessary for him to see all of the chemicals.

Bagnell, Johnson and the other two officers left the restaurant to go to inspect the chemicals while Golub, who stated that he would meet Bagnell at his office later, left separately with Boring. Bagnell led the officers to an apartment in Encino which he shared with his girlfriend. At the apartment he permitted only Johnson to enter.

Inside the apartment Bagnell pointed out a five gallon black can and a white suitcase sitting in the entrance way near the back door. Opening the suitcase, Bagnell took out two gallon bottles which Johnson recognized by their ordor as containing

bromobenzene and cyclohexanol. Johnson had worked with both of these chemicals as a chemist. Although Johnson was unable to pry off the lid of the five-gallon black can, Bagnell indicated that it was piperidine and stated that he had ten gallons more at another location.

Johnson told Bagnell that he would need additional chemicals. Bagnell asked him to submit a list of the additional chemicals needed. They then discussed the terms of their arrangement. Johnson demanded $5,000 in advance. Bagnell agreed to pay $5,000 on delivery of the chemicals and $5,000 when the PCP was manufactured.

After Johnson left the apartment he informed the other officers of what he had seen in the apartment. Bagnell was arrested. Radio contact was made with yet another officer who was surveilling Golub and Boring. The latter were stopped in their automobile and arrested. A search of the interior of the car failed to yield the chemical samples mentioned earlier by Golub. When the officers looked in the trunk they found the above mentioned jar of piperidine.

Officers McConnell and Lanmon stood guard at the apartment while Johnson left to procure a search warrant. During the interim, Bagnell's girlfriend arrived at the apartment. After some conversation with the officers, during which she was informed of the situation, the girlfriend then consented to the officers entering the apartment to await the return of Officer Johnson.

The contraband was in plain view on the premises. When Officer Johnson returned with the search warrant the contraband was taken from the premises.

At the preliminary hearing the magistrate, on motion of the defendant, quashed the search warrant on the grounds that the affidavit was defective in form in failing to specify the time period during which the above described activities took place. Defendant, however, was held to answer on the basis of the officers' testimony as to their observations of, and communications with, the participants in the conspiracy.

In the superior court the People moved under Penal Code section 1538.5(j) to relitigate the magistrate's suppression ruling. The superior court ruled that while the warrant was technically defective, there was an independent basis for admitting the evidence which had been seized. We agree.

Officer Johnson's initial observations of the contraband in the apartment was made at a time when he was lawfully on the premises at defendant's invitation. He would have been empowered at that time to arrest defendant and seize the evidence. (People v. Superior Court (Irwin) 33 Cal. App. 3d 475; People v. Block, 6 Cal. 3d 239; Guidi v. Superior Court, 10 Cal. 3d 1.) The fact that defendant was permitted to exit the apartment before being arrested did not vitiate the officer's authority. (People v. Superior Court (Quinn) 83 Cal. App. 3d 609.)

Furthermore, at a later time, the other officers were voluntarily admitted to the apartment by a co-occupant. They were then presented with a second opportunity to lawfully seize the contraband in plain sight. (People v. Superior Court (Irwin) supra; People v. Block, supra.)

The Fourth Amendment to the United States Constitution speaks of "unreasonable" seizure. It cannot be gainsaid here that the officers conducted themselves in a highly reasonable fashion. Unfortunately, yet understandably, in an effort to insure that their conduct would comport with the requirements of the law they took an unnecessary and abortive additional step in procuring what turned out to be a technically defective warrant.

The superior court judge quite properly observed that the prior reasonable conduct of the officers was not rendered unreasonable by their efforts to act even more reasonably then necessary. Compliance with the requirement of reasonableness under the Fourth Amendment would not be encouraged by suppression under these circumstances.

We are not here dealing with a search of the premises. The issue is simply the officer's right to seize contraband which was in plain sight and which had been voluntarily exhibited to Officer Johnson by defendant.

Basically defendant challeges the officer's right to re-enter the premises to make the seizure after Johnson exited therefrom. He argues that the girlfriend did not give her consent for the police to enter her apartment. In brief, he is challenging

the sufficiency of the evidence of consent as found by the trial court. We test this challenge in the light of the well-accepted premise that factual conflicts must be resolved in a manner most favorable to the ruling of a trial court. (People v. Martin, 9 Cal. 3d 687; People v. Medina, 26 Cal. App. 3d 809; People v. Heard, 266 Cal. App. 2d 747.)

The voluntariness of a consensual entry is plainly a question for resolution of a trial court in the light of all of the circumstances. (People v. James, 19 Cal. 3d 99.) Obviously only the girlfriend's consent was necessary. (People v. Guyette, 231 Cal. App. 2d 460.)

Beyond that, the officer's right to seize the contraband did not terminate with the exit of Officer Johnson. Unquestionably the officer could have immediately re-entered, after the arrest of defendant, and seized the contraband. Defendant concedes this but contends that the lapse of time here - some five hours - between Johnson's exit and the actual seizure interrupted the continuity and vitiated the right to enter without a warrant.

In Vale v. Louisiana, 399 U.S. 30, officers, armed with an arrest warrant, arrested defendant outside of his home and then entered his residence to search for contraband. It was there held that absent a search warrant the evidence produced by that search had to be suppressed. Vale was merely an application of the rule in Chimel v. California, 395 U.S. 752, concerning the scope of a search in conjunction with an arrest. It has no application here.

Similarly, in Michigan v. Tyler, 436 U.S. 499, and Cleaver v. Superior Court, 24 Cal. 3d 297, the issue addressed was the propriety of the police withdrawing from a building after an initial lawful entry and later re-entering to continue to search for evidence.

Each of those cases involved entry into buildings in which there had been fires. Also in each case, for reasons of impaired visibility and other unfavorable conditions resulting from the fire, the police withdrew, waited a period of time and re-entered.

Both the United States Supreme Court and the California Supreme Court held in effect that the re-entry was reasonable and proper as a continuation of the initial search so long as the re-entry was made within a reasonable time and the conditions which permitted lawful entry initially still prevailed.

As we have previously pointed out the officers here did not re-enter to continue to search, but only to seize items that could have been properly seized earlier. That fact alone sets this case apart from the above cited authorities.

Furthermore, application of the rationale of Michigan v. Tyler, supra, and Cleaver v. Superior Court, supra, to the facts at bench compels the conclusion that the officers' conduct was reasonable.

The circumstances which obtained at the time of Johnson's original observations had not changed. The contraband remained in the apartment where

Johnson had observed it. No one had entered in the interim. The lapse of time was not unreasonable and the officer's reason for waiting, i.e., the mistaken belief that a search warrant was needed was no less reasonable than the reason the officers delayed in Michigan v. Tyler and Cleaver v. Superior Court, i.e., poor visilibity, smoke, etc.

The arrest and detention of Golub and Boring was based upon probable cause and was thus proper. The search of the car, as an incident thereto, was also proper since the officers, based upon Golub's own statements, had reason to believe that the automobile contained contraband. That statement coupled with the entire circumstances justified a search of the trunk when the interior of the car failed to produce the contraband. (Compare Wimberly v. Superior Court, 16 Cal. 3d 557.)

The only contraband seized in the search of the trunk was the jar of piperidine which was in plain sight. The attache case and the suitcase yielded no contraband, hence United States v. Chadwick, 433 U.S. 1; Arkansas v. Sanders, ___ U.S. ___ [61 L.ed. 235, 99 S.Ct. -] and People v. Dalton, 24 Cal. 3d 850, are inapposite.

The judgment is affirmed.
NOT FOR PUBLICATION

/s/ COMPTON, J
COMPTON

We concur:

/s/ F. FLEMING, Acting. P.J.

/s/ BEACH, J
BEACH

APPENDIX NO. 2

Los Angeles, Cal. NOV 7 - 1979, 19___

TITLE { People / Walter C. Bagnell } No. 34825

The Court:

Petition for rehearing denied.

CLAY ROBBINS, *Clerk*

① ○ OSP

APPENDIX NO. 3

ORDER DUE
December 14, 1979

ORDER DENYING HEARING
AFTER JUDGMENT BY THE
COURT OF APPEAL
2d District, Division 2, Crim. No. 34825

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE
V.
BAGNELL

Supreme Court
FILED
DEC 13 1979
G. E. BISHEL, Clerk

/s/
Deputy

Appellant's petition for hearing DENIED.

/s/ Bird
Chief Justice